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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1971

No.

DONALD ARNOLD HOWELL PETITIONER

VS.

STATE OF MISSISSIPPI RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

WILKINS AND ELLINGTON
P. O. BOX 504
JACKSON, MISSISSIPPI
ATTORNEYS FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported in 246 So. 2d 95 and is appended hereto in accordance with Rule 23 (1) (i).

JURISDICTION

Judgment of the Supreme Court of Mississippi was rendered on March 15, 1971, and was entered on March 15, 1971. Denial of Petition For Rehearing was rendered on April 12, 1971, and was entered on April 12, 1971. Motion for stay of execution pending petition for writ of certiorari was granted on April 12, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1257 (3), which reads as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> ....
>
> (3) By writ of certiorari, . . . where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution, Treaties or statutes of . . . the United States:

QUESTIONS PRESENTED FOR REVIEW

1. Did the Mississippi trial Court violate petitioner's right to trial by an impartial jury, and his right to due process, by overruling petitioner's motion for continuance

— where local news coverage temporarily saturated the public with facts about petitioner's activities leading up to the arrest;

— where petitioner only asked for a reasonable waiting period until local bias and prejudice could subside;

— where one local newspaper feature article, before trial, detailed essentially the entire case for the prosecution, and at the same time set petitioner up as an example of a five state crackdown on drug abuses, quoting at length the New Orleans Regional Director of the U. S. Bureau of Narcotics and Dangerous Drugs.

2. Did the Mississippi trial Court violate petitioner's right to trial by an impartial jury, and his right to due process, by its failure to grant petitioner's motion for a new trial

— where the primary witness for the prosecution collaborated with police to entice petitioner into the alleged misconduct, and subsequently said primary witness was given a sentence of a number of years less than the minimum required

by state law;

-- where the primary witness for the prosecution admitted having an interest in testifying against petitioner.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was arrested on December 11, 1969, and charged with the illegal sale of narcotics. He was indicted two months later and tried two months after that, Six days prior to trial, petitioner moved for a continuance of the case until the next term of court or for a reasonable period of time. (R-9). (See the entire text of the motion for continuance appended hereto as Appendix II).

A continuance was asked because local news coverage had temporarily saturated the area with stories of the arrest. However, the continuance was denied by the trial court. (R-16A). Petitioner properly and timely preserved this question for federal review, first, at the end of the trial with a motion for new trial, stating in part: "That it was impossible for defendant to receive a fair trial because of the unfavorable publicity immediately prior to the trial of his case"; and "That the Court erred in denying the defendant's motion for a continuance until the pre-trial unfavorable publicity subsided." (R-206). Second, he preserved this point for federal review by way of assignment of error: "The Court erred in overruling appellant's motion for a continuance and motion for a new

trial in violation of appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under the provisions of Article III, Sections 14 and 26, Mississippi Constitution".
(See petitioner's affirmative brief, p. 2).

During the course of the trial the prosecution offered the testimony of a man the police collaborated with to try to entice petitioner into committing the alleged act. (At the time, the man was in jail on a narcotics charge.) After helping the police, he was given a lighter sentence than state law allowed.

Petitioner properly and timely raised and preserved this question for federal review, first, at the end of the trial with a motion for new trial, stating in part: "That the verdict of the jury convicting him was against the law and the evidence." (R-206). Second, he preserved this point for federal review by way of assignment of error: "The court erred in overruling appellant's motion for a new trial on the ground that the verdict was contrary to the evidence."
(See petitioner's affirmative brief p. 10).

ARGUMENT

A. UNDER THE CIRCUMSTANCES, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR CONTINUANCE.

Petitioner does not contend that a continuance must always be granted whenever a case has gotten pre-trial publicity. That would be illog-

ical. Petitioner does contend that his was a case requiring such a continuance, and would respectfully suggest a rule to govern such cases.

The facts are these: the community was given a very large dose of publicity concerning petitioner, including his business, the pre-arrest investigation, and the arrest. Petitioner's motion for continuance contained copies of several such news items. The most prejudicial and damaging articles was one entitled "Crackdown Told On Drug Abuse." The New Orleans Regional Director of the U. S. Bureau of Narcotics and Dangerous Drugs was quoted extensively with regard to petitioner. It was told by this public official how his bureau had investigated petitioner's business following numerous complaints. He told exactly what the investigation revealed and how this led to the arrest. The article continued on with a general condemnation of pharmaceutical firms who aid the drug problem, thus linking by inference the petitioner with a segment of the illegal drug market.

It is admitted that the pre-trial publicity in this case would not fill volumes, as did that in Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16L. Ed. 2d 600. But it would not have to to prejudice a community against an accused. This is especially true in a non-metropolitan community, such as the case here, where one of a handful of pharmacists in the entire community is accused of a crime. The entire community is aware of it and follows it closely. And when the local newspaper prints a semi-editorial finding petitioner guilty as charged, his fate is

sealed.

As the recent Groppi opinion pointed out (91 S. Ct. at 493), Mr. Justice Holmes years ago observed the presumption that juries are "extremely likely" to be influenced by pretrial publicity. (Mr. Justice Holmes called it the "environing atmosphere"). Given this presumption, then, we raise this question: should not the trial judge be bound by Mr. Justice Holmes' presumption, when the publicity reaches the proportions in the instant case, at least to the extent of granting one continuance?

One continuance is all petitioner asked. And this only for one term "or for a reasonable time." His request could prejudice no one. It could not upset the business of the court as a change of venue often does. His request was the smallest favor he could have asked; yet he was refused.

One way to try to meet the problem of pretrial publicity is to grant a continuance of the trial in the hope that in the course of time the fires of prejudice will cool. Groppi v. Wisconsin, ____ U. S. _____, 91S. Ct. 490, ____ L. Ed. 2d _____ (1971). This rule rejects the opinion of the Mississippi Supreme Court in the instant case, suggesting that petitioner's remedy probably should have been for change of venue. Change of venue is often expensive, upsetting to the Court's business, and unnecessary. A continuance is none of these.

In Rideau v. Louisiana, 373 U.S. 723, 83S.Ct. 1417, 10 L. Ed. 2d 663, the statements of a public official were deemed to create special bias and prejudice in the community. In the instant case a public official, the regional director of the U. S. Bureau of Narcotics and Dangerous Drugs, unwittingly added to the credibility of his statements merely by being a public official. Although not accorded the emotional impact of television as occurred in Rideau, supra, the instant case is so similar in two respects that Rideau should control us here: first, the impact of the statements being by a public law enforcement official, and second, the article being circulated in the local newspaper as a semi-editorial or feature article (not a straight news article) containing many conclusions and opinions of petitioner's guilt and guilt by association.

We invite the Court to read Appendix III of this petition and determine whether this one article in itself did not incontrovertably entitle petitioner to a continuance.

In conclusion, we respectfully suggest that this Court enumerate a rule in this case to the following effect: whenever a case receives any substantial pre-trial publicity (as opposed to the gross circumstances condemned in Sheppard v. Maxwell, supra), an accused shall be entitled to a continuance as a matter of right, further remedies to be granted or denied according to the intensity of the publicity.

Petitioner fears that trial courts and appel-

CERTIFICATE

I, the undersigned Edward Ellington, attorney of record for petitioner herein, do hereby certify that I have served a copy of the foregoing petition for writ of certiorari to the Supreme Court of Mississippi on the State of Mississippi, respondent thereto, by mailing a true and correct copy thereof to the Hon. A. F. Summer, Attorney General for the State of Mississippi, first class postage prepaid, to his post office address, P. O. Box 220, Jackson, Mississippi 39205, this the 9th day of July, 1971.

EDWARD ELLINGTON

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ATTORNEYS FOR PETITIONER

late across the land are using the Sheppard case, and other cases of gross abuse, as a measuring stick, an accordingly are denying the basic right to a fair, impartial, "disinterested" jury in many, many instances. Such should not be the case and would shortly cease to be the case with the refinement of the guidelines in this area of procedural due process as petitioner prays for in this petition.

B. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL.

When an informer, in jail himself, collaborates with police to obtain evidence against an accused, and then is given a lighter sentence than state law allows, it should be presumptively concluded that this informer was rewarded for his efforts. Such was the case here.

Conviction for possession of narcotics in Mississippi requires a minimum of five (5) years imprisonment. The informer in question was given four (4) years. (R-20). §6866, Miss. Code 1942 Ann. (1971 Supp.) requires a minimum sentence of five (5) years. It is thus seen that petitioner was convicted largely on the testimony of a collaborator who, it must be presumed, was subsequently rewarded for his efforts. The testimony of such a person should have required the trial court to grant a new trial, excluding such testimony. Failure to do so constituted a denial of a fair trial to petitioner and was reversible error.

APPENDIX I

DONALD ARNOLD HOWELL

V.

STATE OF MISSISSIPPI

No. 46,241

Supreme Court of Mississippi

March 15, 1971

Petition For Rehearing Denied April 12, 1971

RODGERS, Justice:

The appellant, Donald Arnold Howell, was indicted, tried and convicted in the Circuit Court of Harrison County, Mississippi, on a charge of the unlawful sale of narcotic drugs. He was sentenced to five years in the Mississippi State Penitentiary and fined one dollar. His license to practice pharmacy was revoked. He has appealed to this Court and now contends that he should have been granted a continuance and that, in any case, the testimony was contrary to the overwhelming evidence and his motion for a new trial should have been granted.

The appellant argues that his motion for continuance should have been sustained because of certain unfavorable publicity in the newspapers in regard to his arrest and the arrest of other persons charged with a similar offense.

The matter of granting a continuance of a case in the trial court is largely a question addressed to the sound discretion of the trial judge, and, unless it appears that the judge has abused his judicial discretion, a denial of a continuance is not ordinarily grounds for a reversal unless it is apparent to this Court that an injustice will be the result of affirming the ruling of the trial court.

In the instant case the mere fact that the defendant's arrest was reported in a local newspaper is not sufficient evidence to show that the defendant was not given a fair trial. No prejudice was shown to have occurred because of the notice in the newspaper. See Wetzel v. State, 225 Miss. 450, 76 So. 2d 188 (1954); Allgood v. State, 173 Miss. 27, 161 So. 756 (1935).

The proper procedure in case of public excitement and prejudice against a defendant is to request a change of venue. This may not hold true, however, in extreme cases. Lee v. State, 160 Miss. 618, 134 So. 185 (1931). However, a motion to change the venue is the ordinary, proper, and almost universal, rule of procedure. Anno. 39 A. L. R. 2d 1325 (1955).

We find no error in the record on the part of the trial court in refusing to grant a continuance because of public excitement growing out of a newspaper report.

It is next contended that the court should have granted the appellant a new trial on the ground that the verdict of the jury was contrary to the overwhelming weight of the evidence.

This motion is predicated upon the fact that the witness employed by the police to purchase narcotics from the appellant was a criminal with a long criminal record of burglary, possession of narcotics, armed robbery and automobile theft. On the other hand, it is shown that the defendant-appellant is a druggist with a good reputation as a citizen, and is, therefore, worthy of belief.

There is other testimony, however, on which the jury could have reached the conclusion of guilt.

Two policemen testified that they searched the agent sent to purchase the narcotics before and after he went into the drug store and that he had no narcotics before he entered the drug store, but did have narcotics after he came out. They gave him marked money to pay the druggist and they later found this money in the possession of the appellant. Moreover, the defendant admitted to the officers that, "Yeah, I made a sale." The defendant, however, refused to state what he sold to the state's agent.

We think the state's evidence is more than sufficient to sustain a jury verdict of guilty.

The judgment and sentence of the trial court must, therefore, be affirmed.

AFFIRMED.

GILLESPIE, P. J., and BRADY, PATTERSON and SMITH, JJ., CONCUR.

APPENDIX II

DONALD ARNOLD HOWELL

V.

STATE OF MISSISSIPPI

"MOTION FOR CONTINUANCE"

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

APRIL 1970 TERM

STATE OF MISSISSIPPI	PLAINTIFF
VERSUS	NO. 120
DONALD ARNOLD HOWELL	DEFENDANT

MOTION FOR CONTINUANCE

Comes now, DONALD ARNOLD HOWELL, Defendant in the above entitled and numbered cause, and by and through his undersigned attorney moves the Court to vacate the trial setting and continue his trial for a reasonable period of time, and as grounds for this Motion, would respectfully assign the following:

I

That he was indicted during the February 1970 Term of this Court on a charge of illegal sale of narcotic drugs and that his case was scheduled for trial for April 15, 1970, and that because of the illness of his attorney his said cause was continued and on the 20th day of April was called up by the Court and then and there set down for trial on the 29th day of April 1970.

II

That this Motion for a continuance of his trial for a reasonable period of time is predicated upon the ground that the atmosphere surrounding his said trial scheduled for April 29, 1970, as aforesaid, is so thoroughly charged with bias and prejudice against the Defendant engendered by a constant and unremitting barrage of inflammatory newspaper items and special articles appearing in the local newspaper, as well as out of town newspapers, and being broadcast over the local radios and television stations that it is inconceivable that he could receive a fair trial at this time or within the immediate future.

III

That shortly after the returning of the indictment in the said Court, as aforesaid, there were numerous newspaper articles which were severely critical of this Defendant and mentioning him by name and condemning him by innuendo,

some of which said articles are attached hereto and made part hereof and marked Exhibit "A" (1-for reference.

That the last of said articles was as late as April 21, 1970 and that the more recent articles, was an editorial charging the Defendant with having some Thirty Thousand (30,000) dosage units of narcotics, which were seized at his place of business in Biloxi, namely, the Economy Drug Center. Additionally, the New Orleans Regional Director of the U. S. Bureau of Narcotics and Dangerous Drugs observed in the said editorial, "what initiated Howell's investigation was the numerous complaints about his (Howell's) operations. So we went in and conducted an accountability investigation".

"What we found was inadequate in every area. There were several shortages in as much as One Hundred (100%) per cent on some drugs and an almost total lack of security."

IV

That because of such issuance and publishing to the Press and to other news media, as aforesaid, many statements and accusations of a denunciatory nature toward this Defendant has been such as to make it impossible for him to receive a fair and impartial trial because of the recency of such prejudicial statements against this Defendant.

V

That it is virtually an impossibility for anyone reading the said detailed newspaper accounts, stories and editorials, or listening to the broadcasts disseminated throughout the city of Biloxi and this section of Southern Mississippi without being convinced that the Defendant is guilty and that if a trial is held at this time a mockery of justice will follow. Furthermore, that it is improbable that with so large a circulation as the said newspaper has, and so wide a listening audience as the radio and television stations have, that any substantial part of the population of the City could avoid being infected by such inflammatory propaganda, and that because of the large circulation of the said newspaper and the wide listening audience as the radio and television stations have almost every household in this entire area has been exposed not only to the Defendant's alleged activities in relation to the indictment in this case but also in relation to his activities as they relate to other charges. That the said news media has caused prejudice and bias to exist against him and furthermore, that the average person, regardless of his desire to be fair and impartial, can not possibly insulate himself against the surrounding atmosphere. And that to require the Defendant to go to trial at this particular time would deprive him of his liberty without due process of law and in contravention of his

right to a fair and impartial trial as provided by the 6th Amendment of the U. S. Constitution.

VI

The hereinabove mentioned situation can not possibly allow the Defendant nor his attorney to select a fair and impartial jury unless twelve (12) people can be found who do not read newspapers or listen to radios.

Wherefore, Defendant moves the Court to continue his trial until the next term of this Court or for a reasonable period of time in order that the prejudicial affect of the inflammatory news media might subside. And that he moves the Court for such other and further relief as may be just and proper in the premises.

Howard A. McDonnell
Attorney For Defendant

APPENDIX III

DONALD ARNOLD HOWELL

V.

STATE OF MISSISSIPPI

CRACKDOWN TOLD ON DRUG ABUSE

By JIM SELLERS

Daily Herald Staff Writer

The U. S. Bureau of Narcoics and Dangerous Drugs and the Mississippi State Board of Pharmacy Friday announced a comprehensive crackdown on drug abuses in both Mississippi and four contiguous states.

The campaign to halt the flow of dangerous drugs came following a lengthly investigation which resulted in the seizure of more than $316,000 in drugs from three firms including Economy Drug Center in Biloxi where $10,000 worth of dangerous drugs were confiscated Wednesday.

Jerry Jenson, New Orleans regional director of the U. S. Bureau of Narcotics and Dangerous Drugs, said $300,000 in narcotis and

drugs were seized from the I. L. Lyons & Co. Ltd., wholesale drug firm in New Orleans and $6,000 in drugs from the Lakeland Pharmaceutical Co., Fort Smith, Ark.

Biloxi pharmacist Donald A. Howell, 36, operator of Economy Drug Center, is free on bond under both state and federal charges for illegally dispensing and selling dangerous drugs. His trial is scheduled to begin when his attorney recuperates from an illness.

Jenson said Howell's arrest came following a joint investigation by the bureau and the Mississippi State Board of Pharmacy.

"What initiated Howell's investigation was the numerous complaints we received about his (Howell's) operations. So we went in and conducted an accountability investigation."

Jenson said we checked his drug stocks and his inventory records and also his drug security.

"What we found was inadequate in each area. There were severe shortages--as much as 100 per cent on some drugs and an almost total lack of security."

The seriousness of this situation was discussed with U. S. Asst. Atty. Joe Brown of the southern federal district of Mississippi. It was Brown who authorized Howell's arrest.

Jenson said 31,000 dosage units of narcotics were seized at Economy Drug Center in addition to Howell's entire stock of narcotics which included "controlled" drugs such as amphetamines and barbiurates and "exempt drugs" such as cough syrups containing small amounts of narcotics.

The drug crackdown will be conducted under the auspices of a special unit, Jenson said. States to come under scrutiny include, other than Mississippi, Alabama, Arkansas, Tennessee and Louisiana.

The unit, Jenson said, will work fulltime checking inventories and drug safeguards.

He emphasized that particular emphasis will be given to drug handlers who occasionally through deliberate diversion or carelessness allow drugs to enter into the illicit market.

He said pharmaceuical firm owners and operators have, in some cases, deliberately diverted through illegal sales drugs to the illicit market.

"We are trying to do two things, Jenson stated: first, we're trying to eliminate the abuse of these substances, and secondly, to alert the handlers of the fact that these drugs are in great demand by those persons who abuse them."

The result should be, he said, that they (operators and owners) will take the necessary action to assure that drugs do not fall into the hands of drug pushers, peddlers, and abusers.